IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Misc Application No. 626/01

Anil Kumar Gupta & another

Vs

State & another

Date of decision :- 12.7.2005

~~**A.F.R. (Approved for Reporting)**~~

Not approved for reporting

Date :- 12.7.2005 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

CRIMINAL MISC. APPLICATION NO.626 OF 2001
(no. 9887 of 1988- old number)

1. Anil Kumar Gupta
   C/o Sri Brij Mohan Gupta Kirana Merchant,
   General Mahadev Singh Road, Kanwali,
   Dehradun
2. Rajendra Prasad Gupta
   S/o Sri Ganga Bishan Gupta
   R/o 15 Park Road, Dehradun .....Applicants

VERSUS

1. State of Uttaranchal
2. Sunil Kumar Gupta
   Manager Akhil Lines Minerals
   90, Raja Road, Dehradun .....Respondents

Hon'ble J.C.S. Rawat, J.

1. Heard learned counsel for the parties and perused the record.

2. This is a petition u/s 482 Cr.P.C. for setting aside the order-dated 11.4.1988 passed by the Chief Judicial Magistrate, Dehradun in criminal case no.192/1988 Sunil Kumar Vs. Anil Kumar and others.

3. The brief facts are that respondent no.2 filed complaint in the court of Chief Judicial Magistrate, Dehradun alleging therein that the complainant-respondent no.2 received an order for supply of 15 metric tones hydrated lime from the Assistant Engineer, Rural Engineering Services Ghazipur and the said goods were loaded on 25.12.1986 in truck no.USR 9392 from Dehradun to Ghazipur. The bilti of the said lime was settled @ Rs.4125/- and the entire amount was paid in lump sum to the applicant no.1. The said

truck should have been reached Ghazipur on 27.12.1986, but it did not reach in time. Then, the applicant no.1 came to the complainant-respondent No.2 and informed that his truck met with an accident and so on 30.12.1986 he arranged another truck No.USR 9392 through accused no.3. The accused no.1 informed the complainant that the said truck has reached at the destination and the bilti of the goods was handed over to him. Despite best efforts the said truck did not reach at the destination. The complainant alleged in his complaint that the accused persons have misappropriated the said goods of lime and they had hatched a conspiracy to commit the offence. The learned Magistrate vide order dated 11.4.1988 summoned the accused persons under section 120-B and 407 I.P.C. Feeling aggrieved by the said order, the applicants have filed this petition.

4. The learned counsel for the applicants contended that the dispute between the applicants and the complainant-respondent No.2 was purely of a civil nature arising out of contractual relationship with regard to commercial transactions. Even looking to the sworn statements and the notice-dated 29.12.1987, no case is made out to proceed against the applicants on the criminal side. The essential ingredients of the offence under section 406 IPC are not made out as the applicants had no intention at the initial stage to dishonestly misappropriate the said goods. It was further contended that the learned Magistrate committed a serious manifest error in issuing the process against the accused persons. The learned

counsel for the applicants further contended hat the process against the accused persons is patently illegal and unjustifiable. The learned counsel for the applicants further contended that the complaint was filed on 10.2.1988 and the incident took place between 25.12.1986 to 12.5.1987 and the said truck should have been reached at the destination by the first or second January 1987. Thus, the compliant was lodged after inordinate delay. The learned A.G.A. refuted the contentions and submitted that a prima-facie case is made out against the accused persons. The respondent No.2 has not appeared before the court inspite of service of notice.

5. Before examining the contentions of the parties, I would like to discuss the legal position in this regard. Every breach of trust may not result I a penal offence of breach of trust unless there is evidence of mental act of fraudulent misappropriation. An act of breach of trust involves a civil law in respect of which the person wrongs may seek his redressal for damages in civil court, but a breach of trust with mens rea, gives a right to criminal prosecution as well. In order to constitute an offence of a criminal breach of trust the essential ingredients are:-

(i) entrusting a person with property or with any dominion over property,

(ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation (i)

> of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made touching the discharge of such trust or any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do commits 'criminal breach of trust'.

6. In determining the question nit has to be kept in mind that distinction between mere breach of contract and the offence of cheating is a very fine one. It depends upon the intention of the accused at the time of the inducement, which may be judged by the subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give right to the criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. That is the time when the offence is said to have been committed. Therefore, it is the intention or mens rea, which is the gist of the offence to hold a person guilty of cheating at the time of making the promise. From his mere failure to keep a promise subsequently such an intention at the beginning that is when he made the promise cannot be presumed. In the present case the complainant had not averred in his complaint that the accused had an intention to misappropriate the said goods. According to the complaint, the applicant No.1-accused No.1 has stated that he came to the complainant and informed

him that his truck met with an accident and he arranged another truck No.URW 789 through accused no.3 and he had also shown bilty of the said goods to the complainant. There is no averment in the complaint as well as in the sworn statement, which can be said that there was a mens rea at the beginning on the part of the accused persons. The allegations made in the complaint against the accused persons are very vague. From the material that was placed before the learned Magistrate even prima-facie it cannot be said that there was any conspiracy or intention between the accused persons. In the present case, there is no intention to commit at the beginning the offence. Hence, the main ingredients i.e. dishonest intention is not there. As such, if the accused persons have committed breach of trust, it is open for the respondent No.2 to seek his redressal in a competent court or forum to recover the damages. As such, I find that this is purely a case of civil nature.

7. As contended by the learned counsel for the applicants the complaint was filed on 10.2.1988 after a lapse of more than one year. There is inordinate delay in filing the complaint also though there is a limitation in filing the complaint. M/S Uppal Forwarding Agency has arrayed as accused no.3 though there are no allegations against it.

8. In view of the foregoing discussions, I find that the order dated 11.4.1988 is liable to be quashed and the petition is liable to be allowed.

9. The petition is allowed and order dated 11.4.1988 passed by the Chief Judicial Magistrate Dehradun and

the proceedings in complaint case no. 192/1988 Sunil Kumar Vs. Anil Kumar & others is quashed.

Dated 12.7.2005 (J.C.S. Rawat, J.)

MPS